further contact. This approach creates an incentive for callers not to be annoying, so as to avoid the consumer asking to be placed on the company's "do-not-call" list.

For the Commission to make any changes to its current TCPA rules it must compile record evidence to justify the new rules. 92/ It carefully balanced the competing interests when it adopted the initial rules in 1992 and, with respect to the implementation of a "do-not-call" list, nothing has changed in the intervening ten years to upset the Commission's finding. Certainly nothing presented in the NPRM supports a change. As noted above, the number of TCPA complaints the Commission has received says nothing about whether the current rules are working. Indeed, more than two-thirds of the complaints, to the extent they are probative at all, simply fail to address "do-not-call'' issues. 93/

921 Motor Vehicle Assoc. *v.* State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42 (1983) (there is a presumption "against changes in current policy that are not justified by the rulemaking record) (emphasis in original).

931 See Analysis of TCPA-Related FCC Complaints, attached hereto as Exhibit 16. In partial satisfaction of ATAs FOIA request, the FCC provided ATA with what the staff states is a random but representative sample of the over "11,000 complaints about telemarketing efforts" referenced in the NPRM. NPRM ¶ 8 (footnote omitted). Thus, for purposes of these comments, ATA was thus able to review about four percent of the complaints the FCC received since January 2000. ATAs analysis reveals that sixty-five percent do not complain about "do-not-call" violations. See Exhibit 16. According to categories devised by the FCC and its classification methodology, twenty-eight percent of the complaints involve junk faxes, nineteen percent complain about artificial or prerecorded messages andlor autodialers, seventeen percent regard TCPA general solicitations, one percent involve time-of-day complaints, and predicative dialing complaints account for less than one percent of the total. Id. Only thirty-four percent of the documents complain of companies failing to honor "do-not-call'' requests. Id. Notably, of the "do-not call" complaints, over seventy percent allege violations by telephone service providers. Id.

The simple fact is, company-specific "do-not-call" lists have been effective and maximize individual choice. ATA members have millions names on their individual "do-not-call" lists. Mattingley Aff. ¶¶ 6-8, Ex. 6. The number of names on any company's list varies, of course, depending on the size of the company and the number of calls it makes. *Id.* For example, one very large ATA member with a nationwide reach has more than 35 million names on its company-specific "do-not-call list. *Id.* ¶ 8. Other smaller firms that reach only local or regional populations, have much smaller lists. *Id.* ¶ 9. One ATA member, for instance, has only 13 names on its "do-not call" list, while another has 31 names. *Id.* Consequently, the company-specific approach is tailored to fit the size of the entity that must comply with it, and does not impose excessive burdens on small businesses.

From the telephone subscriber's perspective, company-specific lists have been effective. Survey research shows that nearly three quarters of those who placed their names on company-specific "do-not-call'' lists during the previous year reported that calls from the respective firms stopped. See Exhibit 12. Such evidence of actual experience is far more probative of than are comments filed with the Commission that demand a particular policy be adopted. Many comments to the contrary provide no evidence or reasoning, and are nothing more than the product of orchestrated lobbying efforts, such as the spam email campaign undertaken by Indiana's Attorney General. See Exhibit 9.

Even if the Commission finds that the current rules sometimes have been violated, it is not a reason to adopt a national "do-not-call'' database. Any problem arising from current experience with company-specific requirements can be addressed through better oversight and enforcement. For example, if the Commission finds that the public is unaware of its rights under the TCPA, it could adopt enhanced informational rules. Thus, a less restrictive alternative to a national "do-not-call" list under Section 227(c)(3) would be to require common carriers to inform subscribers about their rights under the law (*e.g.*, company-specific "do-not-call" requirements) and private sector alternatives (*e.g.*, caller ID, call blocking, consumer electronics devices). See Playboy Entertainment *Group,* 529 U.S. at 824 (government must explore less restrictive alternatives that include voluntary action). If, after review of the record, the Commission believes that some telemarketers have attempted to evade TCPA regulations, it might be possible to fine-tune the rules to prevent specific practices. 94/

Not only does experience with the existing rules support retaining company-specific lists, but the drawbacks of a national database that the FCC identified in 1992 remain true. A national "do-not-call" list would be unworkable and unduly restrictive. Contrary to one suggestion in the NPRM, a national do-not-call list would not be less burdensome for telemarketers. Quite the opposite, a national list would create a regulatory morass, particularly in light of the conflicting state regulations and the FTC's proposed rules. See NPRM ¶¶ 55-57. Section 227(e)(2) requires states that enforce "do-not-call" lists to use that part of the national database that pertains to each particular state. 47 U.S.C. § 227(e)(2). At the same time Section 227(e)(1)

94/ Depending on what the Commission finds regarding current compliance practices, the rule might be amended to specify that callers cannot hang up to cut off do-not-call requests. Another possible option would be to prohibit blocking Caller ID signals.

purports to preserve state laws that impose "more restrictive intrastate requirements" on telephone solicitations. 47 U.S.C. § 227(e)(1). How such a feat could be accomplished is far from obvious.

What is clear, however, is the extent to which such an approach would impose severe burdens on ATA members, particularly members that are small businesses. As noted previously, some ATA members have as few as 13 names on their company-specific "do-not-call'' lists. Mattingley Aff. ¶ 9, Ex. 6. It would be regulatory overkill to require such entities to participate in a national "do-not-call'' program. Moreover, for small businesses, it will be administratively impossible, and prohibitively expensive in any event, to manage a database as large as any national do-not-call list is likely to become. For large entities, it will be particularly burdensome to try to understand and apply a national list that incorporates all of the disparate state requirements.

Additionally, a national list also would quickly grow stale given the volatility of the telecommunications marketplace. As the Commission recognized in 1992, there would be significant logistical difficulties in keeping a national "do-not-call" list up to date. When it initially adopted TCPA rules, the FCC noted that nearly one-fifth of phone numbers change each year. NPRM ¶ 51. A recent ATA survey found that during the past 10 years, nearly half of the respondents (48.1 percent) had changed their telephone number. With increasing churn rates (and with the advent of local competition) these figures will be only more volatile, making it very difficult to keep DNC lists up to date. 95/

A national "do-not-call" database would be very costly to maintain. In 1992, the Commission estimated a national list would cost at least $20 million in the first year, and could run as high as $80 million. Although costs may have declined due to technological advances, it would still be extremely expensive. The FTC's estimate of $5 million is overly optimistic (and is already being revised upward). See NPRM ¶ 52 n.183 If a national "do-not-call" database is adopted, it would be illegal to impose fees on telemarketers to fund the list, as the FTC has proposed. NPRM ¶ 52 The Supreme Court has invalidated such user fees imposed under the Independent Offices Appropriations Act where a regulated industry did not apply for a particular benefit. *E.g.*, Federal Power Comm'n. *v.* New England Power Co., 415 U.S. 345 (1974). The Court has made clear that the Act is not intended to provide a replacement for taxes needed to support general regulatory functions, but is limited to "special benefits" provided to recipients of federal services. NCTA *v.* United States, 415 U.S. 336 (1974). Applying this logic to the proposed rule, it is hardly a "benefit" to charge telemarketers for the privilege of having their activities sharply curtailed. Rather, the fee schedule would simply impose a substantial burden on the industry, and especially on small businesses.

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95/ Local Telephone Competition: Status as of December 31, 2001, Industry Analysis and Technology Division, Wireless Competition Bureau (July 2002) (total CLEC switched access lines increased by 14 percent during the last half of 2001, and more than 10 percent of the more than 192 million total switched access lines were reported by CLECs, compared to 7.7 percent a year earlier).

Finally, a national DNC database would impose a drag on the economy at a time when the government is seeking to restart economic growth. The rules would have a disproportionately harsh impact on small businesses, which constitute the bulk of ATAs membership. NPRM ¶¶ 73-75. Some ATA members have as few as 13 names on their company-specific lists. Mattingley Aff. ¶ 9, Ex. 6. It would be absurd to require such entities to use a national list Small telemarketers report that compliance with a national "do-not-call'' requirement can spell the difference between success and failure of their businesses. 96/ Accordingly, the Commission should retain the existing company-specific rule, which protects telephone subscriber choices while preserving the legitimate interests of telemarketers.

**2. The Commission Should Reduce the Retention Requirement to Two Years**

The Commission should amend the amount of time that "do not call" requests must be honored under its TCPA rules to reduce the period from 10 years, as currently required, to two years. 47 C.F.R. § 64.1200(e)(2)(vi). The advent of local competition and the explosion of wireless services since the Commission adopted the rule ten years ago have lead telephone subscribers to change their phone numbers

96/ See McGarry Aff. ¶ 8, **Ex.** 7 ("The consequences that a national do-not-call list will have on our [prepaid legal, tax and financial service] business are uniquely severe because the nature of the services we provide precludes much repeat business. We are therefore almost entirely dependent on new clients, and thus must rely on our marketing calls, rather than good will, to generate business [such that] a national do-not-call list that significantly drains our already limited customer pool will . . . put us out of business."); Brubaker Aff. ¶ 16; Affidavit of Stuart Discount ¶ 6, attached hereto as Exhibit 17 ("A national do-not-call list will prove disastrous for our business. * * • * Much of our agents' time is now spent . . . explain[ing] . . . why our not-for-profit clients are not obligated to maintain company-specific do-not-call lists. * * * * [A] national do-not-call regime will exacerbate this problem and engender an even worse one.").

much more frequently than at the time of the *JCPA* Report & Order. 97/ Moreover, the rate at which telephone numbers are being reused once a telephone subscriber changes numbers is increasing. As a result, "do-not-call'' lists are hopelessly out-of-date under 10-year requirement, interested telephone subscribers who receive a re-assigned number may be denied teleservices, and companies are effectively barred from reaching potential customers. These shortcomings would be significantly remedied by adoption of a two-year retention requirement.

The ten-year requirement arose out of the Commission's grant of petitions for reconsideration alleging that indefinite retention (as required under the original rule) was overbroad. See TCPA Recon. Order. 10 FCC Rcd at 12398. The Commission adopted the ten-year term in order to "reflect the fact that residential telephone numbers are recycled." Id. at 12398. In amending the rule, the Commission acknowledged that businesses would have no way to ascertain whether a telephone number had been recycled and assigned to a consumer who might not oppose being contacted. *Id.* ("A call made by a telemarketer solely to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation . . . and accordingly would violate [a] do-not-call request."). Though the Commission "acknowledged that a IO-year requirement [was] not suggested by any of the parties," it nonetheless rejected a 5-year period proposed by the petitioners seeking reconsideration. *Id.* Despite the dearth of record evidence on the issues, the Commission "believed that the "IO-year

97/ Compare NPRM ¶ 51 (citing 20 percent telephone number churn rate at implementation of TCPA), with Number Resource Optimization, 15 FCC Rcd 7574, 7577-79, 7678-82, (2000), and Number Resource Optimization, 14 FCC Rcd 10322, 10324-25, 10363 (1999).

retention requirement will best preserve the careful balance . . . between residential subscriber privacy and reasonable telemarketing practices." *Id.* The Commission pledged that it would "readdress the issue if necessary at a later date." *Id.* See *also* NPRM ¶ 17 n.73.

In the present environment, ten years is not a "reasonable length *of* time for consumers and telemarketers," NPRM **¶ 17,** for the retention of telephone-number-based do-not-call requests. The present rate *of* utilization of numbering resources requires that telephone numbers be reused much more rapidly than in the past. 98/ While telephone numbers based on ten-digit dialing represent a finite resource, the number of access lines has grown 37 percent in the last ten years. 99/ In addition, the number and variety of telecommunications services, and applications relying on them, have grown significantly, which in turn has driven greatly increased demand for telephone numbers.

At the same time, the advent of competition between local exchange carriers, between wireless telecommunications providers, and between wireless and wireline carriers have all contributed to a high "churn" rate of telephone numbers. See infra at Section IV.F.l (discussing wireless and wireline/wireless competition). For the time period until the Commission adopted number portability rules – and for the present

981 See, *e.g.,* Number Resource Optimization, 15 FCC Rcd at 7577-79, 7678-82; Number Resource Optimization, 14 FCC Rcd at 10324-25, 10363.

99/ Compare FCC, Local Telephone Competition: Status as of December ***31,*** *2001,* Industry Analysis Division, Common Carrier Bureau, July 2002, at Table 1 (192,282,132 access lines in 2001), with Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, July 1998, at 97 & Table 19.1 (140,196,551 access lines in 1991).

until they become effective for wireless carriers – each change in service provider required or requires a change in telephone number. *Telephone Number Portability*, 10 FCC Rcd 12350, 12351 (1995) ("telecommunications customers cannot generally retain their telephone numbers if they wish to change service providers or geographic locations"). Thus, the amount of time a given telephone subscriber retains an assigned telephone number has decreased markedly since the Commission adopted the ten-year retention requirement. The Commission should therefore modify the rule to require that companies honor each do-not-call request for a period of two years. 100/

A more limited retention period would comport with the practices of a number of states. In recognition of the rapid turnover of telephone numbers, three states (Arkansas, Florida and Oregon) require annual registration on their "do-not-call" lists, and another three (Georgia, Oklahoma and Wisconsin) have two-year registration periods. Three other states (Idaho, Texas and New York) require registration every three years. Counting these examples, 18 states have a "do-not-call" retention period of five years or less. See *generally,* Exhibit 13 (state law chart). While ATA does not endorse the state "do-not-call" requirements, it is instructive that most state lists use a substantially shorter retention period than does the FCC. The Commission should follow this example and significantly reduce the TCPA retention period. Based on the rate of change in phone numbers, ATA recommends a two-year period

100/ Notably, local telephone directories tend to be published on a yearly basis. This indicates that enough telephone numbers are added, changed or reassigned to merit phone companies incurring the cost of annual publication. This in turn suggests that there are enough telephone number changes on a year-to-year basis to warrant limiting do-not-call requests assigned to each number to a much briefer period.

### B. The Commission Should Retain the Current Definition of "Established Business Relationship"

The Commission should not modify its current implementation of TCPAs exemption for "established business relationships," 47 U.S.C. § 227(a)(3)(B), but rather should maintain the existing definition. 47 C.F.R. § 64.1200(f)(4). As the Commission properly concluded, "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber [ ] interests." NPRM 734 (citing *TCPA* Report & Order, 7 FCC Rcd at 8770, ¶ 34). More to the point, "such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship," with which "TCPA [did] not intend to unduly interfere." *TCPA* Report & Order, 7 FCC Rcd at 8770,734.

Indeed, as explained in greater detail above, telephone subscribers do not object to telemarketing from all callers so much as they oppose telemarketing from callers in which they have no interest. See supra Nadel, ***Rings of Privacy***, 4 **YALE J.** ON REG. at 111 (discussing "desirable calls" telephone subscribers might exclude "[i]f forced to make an all-or-nothing choice"). In that light, any given teleservices call may ultimately be viewed as useful and welcome rather than as disruptive and unsolicited if it appeals to the subscriber's interests. In this way, even "cold calls" can confer significant consumer benefits. At the same time, however, to the extent a consumer has already done business or inquired about it with a given company, it is fair to find it more likely that he or she will find subsequent contact from that company more welcome than a contact from a previously unknown entity. 101/ Consumers can – and often do – benefit greatly when entities with whom they have already done business can propose new or innovative products and services in which the consumer has already shown an interest.

The ability to renew or continue a commercial relationship is just as important from the other side of the bargaining table as well. With the possible exception of morticians, the prospect of repeat business is the lifeblood of any going concern. The ability to contact consumers who already manifest an interest in or a need for a firm's goods or services is critical to maintaining a successful business. Moreover, today's competitive markets demand that companies constantly strive to improve existing offerings and develop new ones *to* keep pace in their industries. Being able to bring such new products to the attention of prime potential buyers is crucial not only to a company's bottom line, but often to the success of new offerings that must attract early adopters to remain on the market. Spreading the word and directing targeted efforts to the most likely purchasers is vital to most businesses.

It would interfere greatly with ongoing business relationships and impede communications between businesses and their customers were the FCC to revisit its earlier conclusions regarding the established business relationship. This is particularly true with respect to the hundreds of small businesses among ATAs membership, who must strive to maximize their marketing dollars to remain viable concerns. See

1011 While this assumption serves as the basis for Congress to include an exemption for established business relationships, it in no way undermines the legislative balancing of business and consumer interests to allow legitimate telemarketing efforts.

McGarry Aff. ¶¶ 6, 8, Ex. 7. *Cf. supra* notes 34-35 and accompanying text (SBA suggests telemarketing is an effective method for small businesses to contact potential customers).

The Commission therefore should not modify – and most certainly should not add new restrictions or criteria to – the current definition of "established business relationship." As a threshold matter, the exemption must exist in meaningful form given its statutory origin. See 47 U.S.C. § 224(a)(3)(B). As such, the Commission cannot overly narrow the exemption's scope to deprive it of meaning, or otherwise sidestep Congress's intent to allow business to contact existing customers and those with whom a commercial "dialogue" has already been initiated. Rather, the FCC must abide by the "well-accepted principle of statutory construction that requires every provision of a statute to be given effect." 102/ The Commission found the appropriate balance in the *TCPA Report & Order* and existing rule by ensuring that businesses are not unduly hampered in their marketing efforts, while limiting the exemption to those telephone solicitations least likely to surprise or annoy their recipients.

The existing definition of "established business relationship" is already sufficiently narrow in its requirement that the relationship be formed by a "voluntary two-way communication" arising from an "inquiry, application, purchase or transaction" by the consumer. See 47 C.F.R. § 64.1200(f)(4). By couching the definition in this

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102/ *USTA v. FCC*, 227 F.3d 450, 463 (D.C. Cir. 2000) (citing *Washington Market Co. v. Hoffman,* 101 U.S. (11 Otto) 112, 115-16, (1879)). See *also Gulf Power Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. (2002) ("While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to 'give effect, if possible, to every clause and word of a statute.'") (quoting *Williams v. Taylor,* 529 U.S. 362, 404 (2000)).

manner, consumers maintain complete control over the formation of the relationship. The relationship cannot arise from communication solely by a business without some kind of affirmative response to create “two way communication,” and there must also be consumer action in the form of a purchase, or from an inquiry, application or other action by the consumer. Consumers also have full control over the duration of the relationship. First, the relationship cannot have been “previously terminated by either party,” id., so action by a consumer terminating his or her relationship with a business nullifies the exemption. Second, as explained in the *TCPA Report & Order*, a consumer request to be placed on a company’s “do-not-call” list terminates the relationship under the rule. NPRM ¶ 35 (citing TCPA Report & Order, 7 FCC Rcd at 8770, n.63). Therefore, since adoption of the rule, consumers have had the ability to enforce their receptiveness to telephone solicitation by companies with which they have an existing business relationship, and nothing in the last ten years has changed that fact.

There is thus no need to specify by rule the “particular circumstances” under which established business relationships arise, see NPRM ¶ 34, or to otherwise embellish the definition. For example, there is no merit to the Commission’s hyperbolic suggestion that a consumer request for the hours a business is open or for directions to a store could somehow constitute an “inquiry” giving rise to an “established business relationship” within the meaning of the rules. The import of the exemption and the underlying purpose of the rules make clear that the inquiry must in some way involve the goods or services the business offers.

Nor would it be appropriate for the Commission to fashion some kind of rule that attempts to regulate the duration of "established" business relationships. *Id.* (asking if "there [is] any time limitation to such relationships"). As a definitional matter, it would be exceedingly difficult to adopt a rule of general application that would establish a meaningful end point for all business relationships. For every good or service offered and renewed in relatively short time frames, such as newspaper delivery or lawn care, there are other goods or services that by design are needed much less frequently, such as mortgage refinancing, insurance updates or chimney sweeping. A fixed period of time – be it weeks, months or years – could never meaningfully apply to all the types of businesses, good and services for which telemarketing calls are made. Rather, the appropriate duration is determined by the nature of the good or service provided. Moreover, as noted above, the definition already includes mechanisms for defining the duration of an established business relationship. If either party expressly terminates the relationship, or the consumer upon being called asks to be put on a business' do-not-call list, the established business relationship exemption no longer applies. *See* 47 C.F.R. § 64.1200(f)(4); *TCPA Report & Order, 7* FCC Rcd at 8770, n.63).

### C. The Commission Should Retain the Existing Time-of-Day Restrictions

The Commission need not modify the time-of-day restrictions currently in place under the TCPA, which prohibits calls to private residences before 8:00 a.m. or after 9:00 p.m. local time at the called party's location. 47 C.F.R. § 64.1200(e)(1). The teleservices industry overwhelmingly complies with this rule. 103/ Because those conducting telephone sales are wary of alienating a potential customer by calling during a restricted time, there is a natural incentive not to offend by calling too late or too early, which translates into strict compliance with the existing rule. Rathbone Aff. ¶ 13, Ex. 3.

Further constricting the allowable time period during which telephone solicitations may be lawfully conducted would place a stranglehold on businesses' ability to effectively sell their products and services and would eliminate jobs. In an era where a majority of men and women work outside of the home, the effective window during which a solicitor may reach someone at home under the existing rules would be reduced to a two to three hour period. In fact, only 11.4 percent of calls made reach a live person from 8:00 a.m. to 6:00 p.m. *Id.* ¶ 11. In contrast, during the peak calling time from 6:00 p.m. to 9:00 p.m., sales agents connect with a live person in 13.9 percent of all calls made. *Id.* Therefore, subjecting the teleservices industry to more stringent time-of-day restrictions, in particular those governing when calls may be made in the evening, would have a profound effect on telemarketing sales will unfairly burden the telemarketing industry.

The current restrictions represent an appropriate balance between consumer interests with businesses' right to free speech. As the Commission has put it, "the current calling time restrictions provide reasonable protections for consumers'

103/ Of the TCPA complaints filed with the Commission, only one percent (as compiled thus far) allege time-of-day violations. See Exhibit 16.

privacy while not burdening the telemarketing industry." NPRM ¶ 36, citing *FTC* Notice, 67 Fed. Reg., at 4521. Accordingly, the FCC should retain the existing rule

### D. The Commission Should Clearly Set Forth the Scope of Its Jurisdiction and Boundaries on State Telemarketing Law

The proliferation of state telemarketing laws since implementation of the TCPA requires that the Commission clarify the allowable scope of state authority in this area. Specifically, the Commission should affirm the Staff Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, dated January 26, 1998, see NPRM ¶ 66 n.220, which explained that the Communications Act grants the FCC exclusive jurisdiction over interstate (and foreign) communications. The letter correctly sets forth the respective authority granted to the FCC and the states in its explanation that:

> Section 2(a) of the Act grants the Commission jurisdiction over all interstate . . . communications . . . defined as communications or transmissions between points in different states . . . [and] Section 2(b)(1) . . . generally reserves to the states jurisdiction over intrastate communications . . . defined as communications or transmissions between points within a state. 104/

Though it may well be the case that "states have historically enforced their consumer protection laws within, as well as across, state lines," NPRM ¶ 63, their actions in doing so with respect to interstate communications overreaches state authority in this area.

104/ Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, January 26, 1998, at 2 (footnotes omitted) (citing 47 U.S.C. §§ 152(a), 152(b)(1), 153(22); Operator Services Providers *of* America Petition for Expedited Declaratory Ruling, 6 FCC Rcd 4475, 4476 (1991) ("OSPA Ruling")).

In the *OSPA Ruling,* the Commission made clear that it "has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted to the Commission" and that its "jurisdiction over interstate and foreign communications is exclusive of state authority." 6 FCC Rcd at 4476-77. The Commission's jurisdiction is even stronger with respect to regulating interstate telemarketing than it is over interstate communications by wire generally, in that Sections 223 through 227 are explicitly excluded from the scope of Section 2(b) of Act, which generally preserves the states' authority to regulate intrastate communication. See 47 U.S.C. § 152(b). The *OSPA Ruling* is thus doubly instructive.

In the *OSPA Ruling,* the Commission considered whether Tennessee could regulate interstate operator services notwithstanding Section 226 of the Act, which required the FCC to adopt rules for interstate operator services. 47 U.S.C. § 226. The Commission found that Section 226 divested the states of jurisdiction over all interstate operator services calls. *OSPA Ruling,* 6 FCC Rcd at 4776. The Commission further found that not even Tennessee's claim to general jurisdiction to protect consumers against unfair, deceptive, and fraudulent practices of interstate carriers survived Section 226 with respect to the regulation of interstate operator services. *Id*. at FCC Rcd at 4477. The Commission also held that Section 414 of the Act, which preserves common law and statutory remedies generally, 47 U.S.C. § 414, was not sufficient for Tennessee *to* retain jurisdiction to regulate any unfair, deceptive or fraudulent provision of operator services. *Id.* at 4777.

The Commission must take the same approach with respect to the states' claims of authority to regulate the interstate provision of teleservices under their claim of authority to enforce "consumer protection laws." The Commission must clarify that its rules – and not those of the states – apply to all teleservices calls that originate in one state and terminate in another. As noted above. this is the textbook definition of "interstate" communications over which the Commission has exclusive authority. Such a determination is unaffected by Section 227(e)(1), which relates to state laws on intrastate telemarketing. See 47 U.S.C. § 227(e).

### E. If the Commission Regulates Predictive Dialers it Should Clarify its Exclusive Authority in This Area

The Commission should avoid nullifying the "benefits of predictive dialing to the telemarketing industry" through overly aggressive regulations aimed at "minimiz[ing] any harm that results from the use of predictive dialers." See NPRM ¶ 26. Predictive dialers are an indispensable tool utilized in cost-effective marketing efforts. The teleservices industry recognizes, however, that predictive dialers, by their nature, are like most tools of prognostication in that they are not perfect. In a very small number of cases consumers may answer the phone only to encounter "dead air" or a dropped call. The teleservices industry has every interest in avoiding such outcomes, and it takes a "best practices" approach to minimize predictive dialer calls that lead to consumer confusion or frustration. Given the relative nascence of predictive dialer use and the industry's interest in striking an appropriate balance between constructive use of the tool and abusive practices, the FCC should exercise restraint with respect to predictive dialers, to the extent it takes any action at all in regulating their use.

### 1. Background on Predictive Dialers

The advent of the predictive dialer has enabled the teleservices industry to increase the efficiency of its call centers and facilitated compliance with state and federal regulation. 105/ These benefits accrue because a predictive dialer uses intelligent algorithms to determine the number of calls it must dial from a list of prospective customers so that, when each sales agent finishes a call, the dialer will have reached a potential customer to transfer to that available agent. The dialer bases its prediction of the number of calls that need to be made on the number of available telephone lines, the number of sales agents on duty, the average number of calls that do not reach a live person (Le., no answers, busy signals or answering machines), and the average length of each call once connected. By taking these and other factors into account, a predictive dialer reduces sales agents' down time – time not spent talking with a potential consumer – and conversely increases their efficiency by as much as ten-fold by eliminating unproductive time that agents would otherwise spend making unsuccessful attempts to reach consumers. Rathbone Aff. ¶ 11, **Ex. 3**

As with any prediction (*i.e.*, weather forecasts, estimates of population growth), there is some percentage of error in the predictive dialer's calculation. That error takes the form of live persons reached by the dialer when there is not an agent available to immediately field the call. When that occurs, a consumer hears dead air

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105/ The predictive dialing software package, which can include software for database administration, answering machine detection, and predictive dialing, facilitates compliance with state and federal regulations because they assist with the management of what time calls are placed to customers to comply with the TCPA time-of-day restrictions, and with avoiding calls to numbers on a company's do-not-call list, as well as those on the DMA and state no-call lists.

upon answering the phone. When the predictive dialer detects that an agent is not available (or will not be available within a very short time) to take a consumer's call, the call is terminated ("dropped calls").

Apart from dropped calls, there may be a brief delay between the time when the consumer answers the phone and the time he or she is connected with an agent, even if an agent is immediately available to take the call. That delay results from answering machine detection ("AMD) software, which determines whether an answering machine or a person has picked up the telephone. The AMD determination is based on two primary sources of data. First, AMD recognizes an upward inflection in the voice followed by silence as human and the absence of that inflection and voice pattern as machine. 106/ Second, AMD listens for popping and hissing that characterize recordings and recognizes their presence as an answering machine. The amount of time in which the AMD must determine whether a person or machine has answered the telephone is a variable set by the user.

Given the relative nascence of the predictive dialer and heightened attention to teleservices spurred by state no-call legislation, the 1,500 inquiries about predictive dialers in 2000-2001 reported by the FCC, see NPRM ¶ 26, and the hits on the FCC website the month following the appearance of a predictive dialer consumer education bulletin, are not necessarily a measure of consumer annoyance with the use

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106/ For example, AMD would recognize the upward inflection at the end of the word "hello" as human. When no inflection is present, as in the case with most answering machine messages (*e.g.*, "You've reached the Smith residence. Please leave a message at the tone."), AMD recognizes the absence as an answering machine. Due to variation in answering machine messages and how people answer their phone, AMD determinations, like predictive dialer timing predictions, are not infallible.

of predictive dialers. 107/ To the extent that predictive dialers cause consternation to consumers, it is likely via the AMD delay and the small percentage of dropped calls that are by-products of the dialer's use. However, some brief delay between answering the line and speaking with a sales agent may be unavoidable if AMD technology is to be beneficial to the teleservices industry. If the AMD is allowed only one *to* two seconds in which to make its determination, AMD will only recognize roughly one-third to one-half of answering machines and send the remaining *one-half to two-thirds* of answering machines reached *to* sales agents. Rathbone Affidavit ¶ 12, Ex. 3. **As** a result, these agents would spend a significant amount of time ascertaining whether they are speaking to a person or to an answering machine. This in turn would diminish the level of agent efficiency, increasing labor costs *to* generate the same amount of sales, and raise phone costs because telephone lines remain connected for longer periods of time. *Id.*. If the AMD is given four seconds *to* make its determination, close *to* 100 percent of answering machines will be recognized. *Id.* ¶ 9. Still, a small percentage of calls to live persons will be erroneously classified as machines and terminated.

The unavoidability of some dropped calls and AMD delay notwithstanding, members of the teleservices industry are mindful of the potential irritation caused by dropped calls and dead air. Industry members therefore take great care in self-regulating their maximum acceptable abandonment rates, *i.e.*, the percentage of calls that are dropped to total calls answered, as well as the AMD recognition interval. The

107/ These inquiries and web-site hits could reflect the lack of consumer awareness regarding these devices, could be spurred by recent attention to teleservices caused by no-call legislation, or could be hits by members of the teleservices industry interested in the **FCC's** views on the subject.

predictive dialer factors these settings into its calculation of how many calls to place. For example, the DMA recommends setting predictive dialers at levels that achieve abandonment rates of no greater than five percent. See NPRM ¶ 26 n.102.

### 2. Proposed Regulation *of* Predictive Dialers

The Commission should refrain from regulating predictive dialers and should not adopt any rules or policies impacting their use other than to clarify the FCC's exclusive authority over the deployment of predictive dialing equipment. As a threshold matter, predictive dialers do not satisfy the statutory definition of "automatic telephone dialing system," which the TCPA and Commission rules define as equipment that stores or produces and dials telephone numbers "using a random or sequential number generator." 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1). Predictive dialers do not generate "random" or "sequential" telephone numbers. Instead, they rely on telephone numbers from lists provided by the equipment operator. These lists are anything but "random" or "sequential." Rather, teleservices providers compile individual prospective customers who will likely be receptive to a caller's offer, often paying for access to such lists. The evolution of the teleservices industry has progressed far beyond the point where placing random or sequential calls would be cost-effective or profitable.

Predictive dialers thus play little role in what numbers are called, 108/ but rather rely upon complex algorithms to dial pre-selected calls, in order to match the

108/ To be sure, predictive dialing software, when paired with the correct hardware, can be used to store and dial telephone numbers randomly or sequentially, but only if a predictive dialer is used in this manner does it fall within the TCPAs definition of "automatic telephone dialing system." On the rare occasions where a company elects number of live voices reached with the number of sales agents available to take calls. Compare *S.* Rep. 102-177 at 2 (citing "automatic dialers that will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls" among reasons for autodialer prohibitions). Predictive dialers thus replace only the dialing and timing functions that would otherwise be carried out by a human caller. They still require that an operator obtain and program a list of numbers to call which, as noted, are typically telephone numbers of existing customers, or those obtained from other sources. The central function of the predictive dialer is to pace the quantity of calls placed based on the number of available agents, the average length of calls, and other variables, and to send those calls to the sales agents. Predictive dialers thus lack the function of selecting numbers to call, which is the sine *qua* non of automated telephone dialing systems. Unlike the autodialers Congress sought to regulate, predictive dialers are a useful tool in directing telemarketing calls in an intelligent, non-random manner for optimal efficiency.

#### a. The Commission Should Either Decline to Regulate, or Should Exercise Great Restraint in Regulating, the Use of Predictive Dialers

The Commission's regulation of predictive dialing technology should be limited and undertaken with great caution to avoid stifling businesses' legitimate attempts to generate sales of goods and services. ATA submits that the Commission should continue to allow the teleservices industry to refine the use of predictive dialers

to utilize a predictive dialer in this manner, it is already subject to the TCPA and FCC restrictions on the use of autodialers.

to minimize consumer concerns arising from the consequences of predictive dialer use, such as dead air or abandoned calls. The industry already has a strong incentive to minimize dropped calls and dead air. See, *e.g.*, Telemarketing and *Competition* Study at 8 ("firms have a strong incentive to avoid irritating their own customers"). See also Rathbone Aff. ¶ 10, Ex. 3.

Should the Commission nevertheless adopt rules guiding the use of predictive dialers, however, it should do so with a light hand. For example, if the Commission elects to regulate abandonment rates, it should adopt rules no more stringent than the five percent DMA standard. Specifically, the Commission, if it adopts any rule, should require teleservices providers to set any predictive dialer used to achieve a ratio of dropped calls to calls answered of no more than five percent. Holding teleservices providers to a more stringent standard would obviate the usefulness of the predictive dialer to the industry. Strikingly, sales agent down time can soar to higher than 80 percent when attempting to establish a one percent error rate. Rathbone Aff., ¶ 11, Ex. 3 (downtime reached 84 percent). Even at the DMA standard, sales agent down time can reach 84 percent during peak calling hours. Id. In short, there would be little or no advantage to using predictive dialers under restrictions more stringent than the five percent DMA standard.

Additionally, if the FCC implements an abandoned call standard, the FCC must provide a precise definition of "abandoned" or dropped calls. The only feasible definition is when a subscriber (rather than his or her answering machine, voicemail, or some other device) answers the telephone and the predictive dialer terminates the call before a sales agent speaks with the consumer. "Abandoned calls should not include those not answered by a live consumer, nor should teleservices businesses be penalized when the consumer terminates the call before being connected with a sales agent, as this outcome is entirely beyond the control of telemarketers. Any other alternative to the definition proffered above, such as defining abandoned calls by the length of time the consumer waits on the line before speaking with a sales agent, 109/ is pragmatically, administratively, and economically unworkable.

Teleservices providers that rely on AMD and predictive dialing technology cannot control *the* total length *of* time a consumer might wait on the line before speaking to someone independently of the abandoned call rate. The only way a predictive dialer can determine the maximum amount of time a consumer might wait to speak with a live person before the call is dropped is based on the setting the operator establishes for abandoned calls. This fact not only weighs against defining an abandoned call by consumer wait time, it obviates the need for the FCC to regulate AMD technology if it chooses to regulate abandoned calls, because any abandonment regulation would constitute an indirect regulation of consumer wait time.

Though the total wait time caused by AMD and predictive dialing cannot be independently controlled, the user can control the timeframe during which the AMD must determine whether a person or machine has answered the call. However, any time limit placed on the AMD's determination must take into account that AMD technology becomes highly inefficient, and is of little value. As discussed earlier, when

109/ For example, under this approach, a dropped call might be defined as any call in which the called party waits for more than five seconds without speaking with a person.

AMD is given one to two seconds to complete its analyses, it fails to properly identify as much as two-thirds of answering machines reached. Instead, these calls are sent on to agents who spend time and money dealing with calls that could be more cheaply and quickly handled if the AMD is given a little more time. Accordingly, if the FCC decides to regulate the maximum time AMD is given to make its determination, that time should be at least four seconds to prevent telemarketing costs from sky-rocketing and to avoid rendering AMD technology obsolete to the teleservices industry.

A better solution to redress potential annoyance associated with consumer wait time or dropped calls would be precluding "dead air" through the use of recorded messages, such as "please hold for a representative of . . ." or "Hello, someone will be right with you . . . ." Such a solution is permissible under Section 227(b)(2)(B), which provides for the exemption of certain recordings from the prohibition in Section 227(b)(1)(B) on using artificial or prerecorded voices to deliver messages to residential telephone lines without the called party's consent. Specifically, Section 227(b)(2)(B) allows the Commission to grant such an exemption for "classes or categories of calls" that "will not adversely affect . . . privacy rights" and "do not include the transmission of any unsolicited advertisement." Recorded messages used in conjunction with predictive dialers to avoid dead air until a live agent can get on the line clearly comprise a class or category of prerecorded messages that would fall within the exemption. Such recorded messages would not "adversely affect" consumers, but rather would benefit them by avoiding the "dead air" that some consumers find annoying or disconcerting. 110/ Moreover, the recording would not transmit an "unsolicited advertisement," which would be the province of the agent once connected, but rather would merely communicate that a live agent will be on momentarily.

The above solution is superior to the Commission's other suggested possible solution of requiring telemarketers to transmit, or refrain from blocking, caller identification or ANI information (in locations where ANI is available). NPRM ¶ 26. Though predictive dialing technology is capable of transmitting ANI information, a caller-ID-based fix is unlikely to reduce possible frustration when a predictive dialer terminates a call. To be sure, it may give the consumer an opportunity to not answer the call. However, if the consumer chooses to answer the call, his or her frustration may be increased, rather than decreased, by the predictive dialer dropping not just any call, but a call in which the consumer had sufficient interest to answer the phone. Moreover, caller-ID-based solutions would not only fail to mitigate the dropped call problem, it would be completely ineffectual where (i) caller ID is not available where the call originates, (ii) caller ID is not available where the call is received, and (iii) where a consumer has elected not to subscribe to caller ID.

Finally, there is no basis for the FCC to join the FTC in concluding that dropped calls violate rules requiring that telemarketers identify themselves. See NPRM ¶ 29. First, ATA notes that dropped calls and dead air that arise from the use of predictive dialers do not violate the Commission's rules that require telemarketers to

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110/ As an added side benefit, the recorded message could immediately identify the calling party or on whose behalf the call is made, and it would provide customers the opportunity to terminate the call without remorse over hanging up on an actual person.

identify themselves when using autodialers to send artificial or prerecorded messages. See id. (citing 47 C.F.R. § 64.1200(d)(1) and (2)). As discussed above, predictive dialers are not autodialers, and they do not utilize artificial or prerecorded messages, see supra Section IV.E.l, so they cannot run afoul of Sections 64.1200(d)(1) and (2). 111/ Second, ATA respectfully submits that the FTC erred in concluding that abandoned calls violate the identification requirements of the Telemarketing Sales Rule. *Id*. (citing 16 C.F.R. § 310.4(d)). No liability should arise under Section 310.4(d) if consumer action precludes a teleservice provider's identification efforts. For example, even in cases where a live agent is on the line, if the consumer discerns the telemarketing purpose of the call and hangs up before or while the caller completes the introduction, there can be no rule violation. 112/ In much the same way, if a consumer

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111/ Should the Commission elect to resolve dropped call/dead air concerns by implementing the above-discussed solution of allowing a brief recorded message if a live agent is not immediately available when a predictive dialer completes a call, the call would still not fall within the ambit of Sections 64.1200(d)(1) and (2), as predictive dialers are not autodialers, and thus do not meet the threshold criterion in those rules.

112/ Violation of the Telemarketing Sales Rule's prompt disclosure requirement is triggered by a caller's failure to make the necessary disclosures prior *to* making a sales pitch. When a call is terminated prior to a sales pitch, there is no need for a caller to make the required disclosures. This view **is** in accord with the FTC's understanding of the rule when it was adopted. See FTC Statement of Basis and Purpose and Final Rule, 60 Fed. Reg. 43842, 43856 (1995). In the FTC's Revised Notice of Proposed Rulemaking as well as its Statement of Basis and Purpose, it made clear that the required oral disclosures need not be made "at the beginning" of a call, see 60 Fed. Reg. 30406, 30418 (1995), but must merely precede "any substantive information about a prize, product, or service." 60 Fed. Reg. 43842, 43856 (1995). Indeed, the FTC advises that to comply with the Telemarketing Sales Rule, callers must, "at a minimum," make the disclosure "before any sales pitch is given." FTC, Complying with the Telemarketing Sales Rule, A Business Guide Produced by the Federal Trade Commission in Cooperation with the Direct Marketing Association, Apr. 1996, at 17. Therefore, when a recipient terminates a call before the caller has a chance to deliver a sales pitch, it is not possible for the caller to violate the prompt disclosure rule.

hangs up on dead air, or a predictive dialer terminates the call before the opportunity *to* make the necessary identification arises, there should be no violation of the FTC rule. 113/

### b. The FCC Should Assert Its Exclusive Authority Over Predictive Dialers

The Commission must take the opportunity presented by this proceeding to assert its exclusive jurisdiction over all predictive dialer issues. 114/ Notwithstanding the FTC's musings on the issue, predictive dialers are customer premises equipment ("CPE") over which the Communications Act gives the FCC exclusive authority. 115/ Congress defined "customer premises equipment" as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate

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113/ ATA notes that the FTC's statement cited in the NPRM arose in the context of a proposed rulemaking, as the Commission acknowledges. See NPRM ¶ 29 nn.112-113. As such, its conclusions regarding abandoned predictive dialer calls are still subject *to* influence by the comments in that proceeding and, potentially, further consideration. Notice of Proposed Rulemaking, 67 Fed. Reg. 4522, 4524 (Jan. 30, 2002). In any event, Section 310.4(d) seeks to prevent fraudulent sales practices and prevent unsuspecting consumers from being unaware they are the targets of a sales pitch. See, *e.g.*, S. REP. NO. 103-80, at 4, 9-10 (1993) (stating that disclosure requirements will protect consumers against telemarketing fraud). If a telemarketer never speaks with the called party, as is the case with calls terminated by a predictive dialer, no sales pitch follows so there is no danger that the consumer might be duped.

114/ The Cornmission should be aware that certain states, like California, are currently considering regulating the use of predictive dialers.

115/ See, *e.g.*, Essential *Communications Sys.*, Inc. *v. AT&T*, 610 F.2d 1114, 1116 ("in 1974, the FCC asserted exclusive jurisdiction over regulation of the interconnection of customer-provided terminal equipment [and was] sustained by the Fourth Circuit Court of Appeals") (citing *Telerent* Leasing Corp., 45 F.C.C.2d 204 (1974) *aff'd sub* nom. *North* Carolina Util. Comm'n. *v.* FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976), recon. denied, 552 F.2d 1036 (4th Cir.), *cert.* denied, 434 U.S. 874 (1977)).

telecommunications." 47 U.S.C. § 153(14). Predictive dialers clearly are CPE under the Act: they reside at the business location of a seller of goods or services, or its teleservices provider, and they exist solely to originate, route, and terminate telecommunications traffic.

Given its exclusive authority over CPE, the Commission must clarify that states are preempted categorically from regulating predictive dialers. Several factors support the Commission's preemptive authority in this area. Chief among these is that the TCPA preempts state law with respect to technical and procedural standards. *See* 47 U.S.C. § 227(e) (stating that "state law [is] not preempted . . . [e]xcept for the standards prescribed under subsection (d)" regarding "technical and procedural standards"). While this preemptive effect applies most clearly if the Commission should find, notwithstanding the discussion above, that predictive dialers are automatic telephone dialing systems, there is no doubt that "in deciding how to regulate previously non-existent technology, the Commission is empowered to take cognizance of the changes wrought by advancing technology." 116/ The Commission should thus interpret its preemptive power over technical standards to extend equally to regulation of technology that was not widely used at the time the TCPA was enacted, such as predictive dialers. 117/ Exclusive FCC jurisdiction in this area is also supported by

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116/ *NAB v. FCC*, 740 F.2d 1190, 1208 (D.C. Cir. 1984)) (citing *Computer and Communications Ind. Ass'n v. FCC,* 693 F.2d 198, 212 (D.C. Cir. 1982)). *See* also 137 Cong. Rec. S.18784 (Nov. 27, 1991) (Statement of Senator Hollings) ("The FCC is given the flexibility to consider what rules should apply *to* future technologies . . . .").

117/ *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("The Communications Act delegates broad authority to the Commission to regulate constantly evolving communications facilities that have transcended in complexity and

Section 2(b) of the Act, which reflects a clear intent to divest states of authority, in several specified areas, including the regulation of telemarketing. See 47 U.S.C. § 152(b) ("Except as provided in sections 223 through *227 inclusive*, . . . nothing in this Act shall be construed to apply . . . to . . . intrastate communication") (emphasis added).

Furthermore, teleservices providers use predictive dialers to engage in inter- and intrastate communications concurrently, so it is not feasible to separate them physically or as a regulatory matter. In addition, whatever regulatory approach the FCC takes toward predictive dialers – including refraining from imposing regulations at this time – state efforts to impose regulations that are inconsistent with the FCC regime and/or other state laws would effectively thwart legitimate federal objectives annunciated by this Commission. See, *e.g.*, *North* Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (upholding FCC preemption of state regulation of customer-supplied telephones); *Texas* Public Util. Comm'n *v.* FCC, 886 F.2d 1325 (D.C. Cir. 1989) (upholding FCC preemption of state regulation of private microwave system connection to public switched network).

### F. The Commission Should Place Wireless and Wireline Subscribers on Equal Footing with Respect to Teleservices

The Commission correctly surmises in the NPRM that revisions to its telemarketing rules and policies are necessary to address the evolution of wireless

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power far beyond the specific technologies known to its drafters in 1934."); Committee *for* Effective Cellular Rules v. *FCC*, 53 F.3d 1309, 1317 (D.C. Cir. 1995) ("flexibility [to change standards in a rulemaking] is necessary to allow agencies, particularly the FCC, to respond to rapidly changing technological, commercial, and societal aspects of the industry as they fulfill their delegated duties") (quoting Rainbow Broadcasting Co. *v.* FCC, 949 F.2d 405, 409 (D.C. Cir. 1991)) (internal quotation omitted).